IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 340.

JULIUS HYMAN & COMPANY, ET AL., *Petitioners,*

v.

VELSICOL CORPORATION, *Respondent.*

PETITION FOR REHEARING.

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Your Petitioners above named, JULIUS HYMAN & COMPANY, ET AL., pray that a rehearing be granted on the order of this Court entered November 5, 1951, denying Petitioners' Petition for Writ of Certiorari to the Supreme Court of Colorado.

Rehearing is requested under Rule 33 of the Rules of this Court in order to present other substantial grounds available to Petitioners not previously presented and to direct attention to an intervening circumstance of substantial effect.

In their Petition for Writ of Certiorari, Petitioners failed to direct the Court's attention to two effects of the Judg-

ment of the Colorado Supreme Court which create vital reason why this Court should take jurisdiction to reverse it and to remand it for further proceedings.

The first is that the injunction against Petitioners is so broad and indefinite that it has the effect of preventing them from pursuing their chosen profession, thus violating the Fifth Amendment to the Constitution of the United States. We submit that this Court should take jurisdiction to set aside the injunctive relief granted.

The second effect of the Judgment is to create a perpetual injunction against Petitioners and to require a perpetual accounting to Respondent for the profits of Petitioner Julius Hyman & Company from the manufacture of chlordane and may bar action which might otherwise be taken at any time because of interim events to terminate the injunction and suspend the accounting for profits. For the District Court's rejection of Petitioners' evidence of publication and the Supreme Court's determination that Petitioners are estopped to introduce evidence of publication may bar Petitioners from establishing that Respondent or others have published chlordane so widely that at some point it has truly become public knowledge so that the inhibition on Petitioners' use of it should as of that time be ended.

This Court should take jurisdiction to reverse the ruling of the lower Courts rejecting the introduction of all evidence of publication of chlordane.

The Secrecy Agreements and the Injunction Enforcing Them Are So Broad and Indefinite As To Be in Restraint of Trade and To Violate Petitioners' Rights Under the Fifth Amendment To Engage in Their Chosen Occupations.

In their Petition for Certiorari, Petitioners attacked the injunction of Petitioner Hyman from making chlordane as a violation of a constitutional right to engage in interstate commerce because based upon no evidence of an applicable

secrecy agreement and upon an erroneous application of the doctrine of implied contract arising from confidential relations. Petitioners failed to urge the additional substantial ground, argued in the Court below, that even if proved the secrecy agreements asserted are unenforceable. These agreements and the injunction enforcing them are so broad and uncertain in their terms as to deprive Hyman and the other individual Petitioners of their "life, liberty, or property, without due process of law" in violation of the Fifth Amendment, by rendering it impossible for them to earn a livelihood in their chosen professions.

Each of the three agreements, one or more of which were allegedly signed by each individual Petitioner, contained a clause substantially as follows:

> "The undersigned hereby agrees that at all times, both during his employment and after the termination of his employment, he will keep secret all processes, inventions and formulas made known to him by the Company or any of its officers or employes or learned by him while in the employ of the Company and that he will not disclose or make known any of the same or anything relating to the same to any person, firm or corporation except when authorized so to do by writing signed by the President of the Company." (R. 1, pp. 7, 9, 11)

There is no limitation in this covenant to trade secrets in which Respondent claims a proprietary right or even to matters wholly within the field of Respondent's business, nor is the time within which it shall be effective limited in any way.

The Denver District Court enforced this agreement by enjoining all individual Petitioners from disclosing chlordane, its formulae and processes "and from disclosing any other processes, formulae or products discovered by or revealed to them and each of them while in the employ of plaintiff [Respondent]."

The law is old and clear that the Courts will sustain only that degree of restraint upon one party absolutely neces-

sary to the protection of another. *Fowle* v. *Park,* 131 U. S. 88 (1889). The employee being normally in the weaker contractual position, his means of earning a livelihood in the field in which he is best suited is especially deserving of protection against restraint. See 1 Callmann, *Unfair Competition and Trade Marks* (1945) 655. And while specific valuable secrets may be protected, agreements preventing the employee from using the skill and knowledge acquired in the employer's business will not be enforced. Callmann, *op. cit. supra.* Courts have repeatedly held that agreements containing general clauses such as those in the agreements Respondent had Petitioners sign are unenforceable because they place too great a restraint upon the employee. *Sprague Electric Co.* v. *Cornell Dubilier Electric Corp.,* 62 F. Supp. 1 (D. Del. 1945); *Taylor Iron and Steel Co.* v. *Nichols,* 73 N.J. Eq. 684 (1908).

The enforcement of the broad and general Velsicol agreements by the Colorado Courts by a broad and general injunction against "disclosing any other processes, formulas or products discovered by or revealed to them and each of them while in the employ of plaintiff [Respondent]," places all Petitioners under a threatening cloud of vast compass and obscure outlines.

Respondent's own circumstances render the restraint both indefinite and unreasonably broad.

Velsicol had operated research laboratories for 15 years when Petitioners left its employ.

As of that time it had over 20 employees in its laboratories in addition to the much greater number elsewhere in the organization.

Over the years, countless experiments had been carried out and doubtless countless "findings" and "discoveries" recorded, which were of no particular significance at the time but which might afford basis for a later claim against any former employee or his then employer if work is done by them in that field with commercially successful results.

The circumstances of Petitioners render the restraint both indefinite and unreasonably restrictive.

Petitioner Hyman, whose entire professional life, with the exception of a prief period with the Pure Oil Company, had been devoted to Velsicol, and most of whose skill and knowledge as a practicing chemist must have been gained there, is compelled by the sweeping injunction to erase the learning of a lifetime. He can hardly continue safely as a chemist in any of the fields with which he is familiar without risk of contempt of the injunction at every turn.

Could any chemical or research organization safely employ Hyman under the threat of this injunction? Could it safely employ Charles Beckwith, Daniel Bonnell, Rex Lidov, or any of the other chemists among Petitioners, who may have encountered somewhere in the dim past with Velsicol now forgotten matters which may come to mind again in new context with a new employer, or who may start from old knowledge gained at Velsicol to create new knowledge?

There is another group equally oppressed by the generality of the secrecy agreement and the enforcing injunction.

Petitioner Robert Silber, general attorney for Velsicol, was unconnected with its patent affairs and was not shown to have had any contact with Velsicol's technological affairs.

Edward Espres, advertising manager of Velsicol, likewise was not shown to have access to any secret information.

Steve Pocsis was a laborer charged with installation and maintenance of recording equipment.

Roy J. Miller was an oil refinery construction man, employed only at Velsicol's petroleum cracking plant at Los Alamitos, California, prior to 1940, and never thereafter employed by Velsicol.

Can this latter group reasonably be subject to injunction and can they possibly know what they are enjoined against

doing? They have not been shown in the record to possess a single secret and their circumstances make it unlikely that they do. This being so, what part of the experience they gained at Velsicol they are forbidden by the injunction from employing, there being no evidence to identify or particularize the secret and no direction in the injunction which gives guidance, they can have no means of learning.

In the absence of express guides, Petitioners' only safe rule of conduct is to assume that the Colorado Supreme Court so construed the agreement Petitioners executed as to deprive them of making any commercial use of any technical, chemical or even general knowledge gained while associated with Velsicol.

Thus is illustrated the vicious effect of adoption by a Court of the broad-brush technique of injunction, accepting inference of secrecy and of secret knowledge and testimony of "technique" and "know-how" in lieu of proof of specific secrets, and employing sweeping and indefinite restraints in lieu of specific prohibitions properly informative to the restrained. It has been said that an injunction should have the particularity of an indictment. This maxim was surely never more violated than in this case.

The injury to Petitioners' rights and the undue restraint upon their competitive efforts is very real and dangerous. Experienced in various ways in the chemistry of paints, varnishes and insecticides, or in their manufacture and the trades and practices associated therewith, through devoting varying substantial portions of their lives to this field, it comprises their experience and the subject of their skill and knowledge. This experience and these skills are their stock-in-trade in earning a living. The nebulous, encompassing agreement to which they have been held bound and the equally indefinite injunction will not only restrict their activities in peril of violation but will frighten away future employers in this field, who will not wish to "hire a law suit" by involuntarily becoming party to

some unrecognized violation of this indefinite injunction.

It is contrary to the most elemental constitutional rights of American citizens to take away from them the right to use for their livelihood the only knowledge and experience they possess. The Velsicol secrecy agreements should not have been enforced; the injunction enforcing them is invalid for indefiniteness. This Court should take jurisdiction to declare unequivocally that secrecy agreements and agreements not to compete must be of clearly defined and limited scope and based only upon the essential need of an employer to protect its legitimate interests in order not to violate the constitutional rights of the individual and the federal policy against unlawful restraint of trade.

The Restraint by Estoppel to Introduce Evidence Effected by the Lower Courts' Judgments Created a Perpetual Restraint Impervious to Proofs of Changes in Circumstances Which Should End the Restraint.

The Denver District Court rejected Petitioners' evidence of certain specific publications of the chlordane invention on Respondent's objection that they were immaterial.

The Colorado Supreme Court upheld this action on the ground that Petitioners were estopped to take advantage of any publication.

The Denver District Court's failure to receive evidence of any publication and the Colorado Supreme Court's affirmance of this rejection may establish a bar to evidence putting an end to Respondent's secret as to Petitioners. Moreover, coupled with the granting of injunctive relief and decree of an accounting for profits, they give Respondent a perpetual privilege against Petitioners with regard to chlordane, which may prevent the latter from obtaining suspension of the injunction and termination of the accounting for profits at any time, even beyond the publication of the invention under United States patent

laws which occurred in 1950 and, in fact, even beyond the life of the patent itself.

It would seem obvious that Respondent should not have been granted a perpetual monopoly, immune to changing circumstances; that its exclusive right to chlordane should be forfeitable at some time and by some type of publication, even as to Petitioners, and that the effect of the publication is to be determined upon the facts surrounding it.

The improper and unwarranted effect of this status of the case is highlighted by a significant occurrence. Since the denial of the Petition for Certiorari, Respondent has filed with the Supreme Court of Colorado a motion that this case be remanded to the Denver District Court for, among other things, a further accounting for a period beyond that included in the accounting already had in this case.

It has come to the knowledge of counsel for Petitioners in this cause and in this Honorable Court since the filing of the Petition for Writ of Certiorari in this case, that a German chemist had independently discovered chlordane, the process for its manufacture and its insecticidal properties beginning in 1946 and had published his findings, including its molecular weight (M-410) and structural formula, in a German scientific publication, *Die Pharmazie,* on or about March, 1948; and that such article was sent to the Department of Agriculture of the United States and by a member of the Department of Agriculture transmitted to Petitioner Hyman during 1948. A translation of said article is attached hereto as an Appendix.

By that date, therefore, information sufficient to produce chlordane had not only been put into the public domain by Respondent, through filing patent applications in Great Britain, Belgium and other countries under local law requiring the disclosure of the process sought to be patented, but the same had entered the public domain and become public knowledge accessible and known to Petitioners by virtue of the publication thereof from an entirely independent source.

The effect of this publication upon the restraint on Petitioners deserves the careful consideration of the Denver District Court as a ground for vacating the injunction and for limiting the accounting for profits to the period prior to its occurrence. But the Judgment of the Colorado Supreme Court, raising a broad estoppel against Petitioners, may be regarded by the District Court as a mandate to exclude the evidence. To come again to this Court to correct this exaggeration of the lower Court's error will be circuitous in the extreme.

The glaring error of the Colorado Courts, of course, is that the restraint upon Petitioners is based, not upon a consideration of all of the material evidence pertaining to it, but upon a rejection of such evidence.

The vice of a restraint of trade based on estoppel to introduce evidence, creating a perpetual restraint and forever closing the door to evidence which might destroy the foundation of the restraint and with it the restraint itself, is thus so clearly demonstrated in this case that this Court should seize the occasion to do away once and for all with such use of estoppel in contravention of Federal policy as announced in *MacGregor* v. *Westinghouse Electric and Manufacturing Co.*, 329 U. S. 402 (1947); *Scott Paper Co.* v. *Marcalus Manufacturing Co.*, 326 U. S. 249 (1945); *Conmar Products Corp.* v. *Universal Slide Fastener Co.*, 172 F. 2d 150 (C. C. A. 2d, 1949) and other cases.

We, therefore, request that this Court take jurisdiction to reverse the Judgment of the Colorado Supreme Court on the ground that the rejection of evidence of publication on the ground of estoppel was improper and to remand the case to the Denver District Court with instructions to receive all such evidence with the determination thereafter being made on the basis of such evidence as to whether any publication has been proved of which Petitioners can avail

themselves and which should bar any injunctive relief and accounting for profits, or place a terminal date upon them.

CLAUDE PEPPER,
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Attorney for Petitioners.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and further that it is restricted, in accordance with Rule 33 of the Rules of this Court, to substantial grounds available to Petitioners not previously presented and intervening circumstances of substantial effect.

CLAUDE PEPPER

APPENDIX.

Die Pharmazie
Jahrg. 3, Heft 3, pp. 115-116

Preliminary Communication on New Contact-Insecticides of the Halogen-Hydrocarbon Class

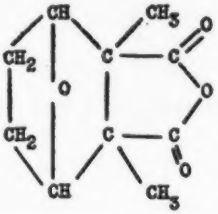
by

R. Riemschneider and A. Kühnl

Systematic investigations on the contact-insecticidal properties of the Halogen-hydrocarbon Class have, as has already been communicated in other places (1), led to new very active contact poisons (M 410, M 344, and related compounds (2)). The starting point for the works that led to the discovery of these materials was the investigations on non-aromatic cyclic halogenhydrocarbons which had shown that a higher degree of halogenation is one of the assumptions for the excellent contact-insecticidal effectiveness of this class of compounds (3). However this discovery together with the assumption that "ideal-insecticide-like" halogenhydrocarbons must have a molecular weight lying between 270 and about 430 was not sufficient for the formation of a serviceable working hypothesis, especially as the guiding lines (4) given hitherto apply for the most part only to halogenhydrocarbons which contain at least one aromatic component. The number of the cyclic halogenhydrocarbons coming into consideration is always extraordinarily large, even within the limits of the molecular size, if we think of mono-, bi-, up to penta-cyclic bodies of varying C-number and varying Fluorine, Chlorine, or Bromine content. An extensive investigation, such as, for instance, was possible in the Diaryl-alkane and alkene compounds, here seemed hardly capable of accomplishment from the first, since the production of higher halogenated cyclic hydrocarbons often raised considerable difficulties, particularly when an isomeric separation is necessary.

However a relatively simple choice was found when an attempt was made to find effective materials among "cantharidine-like" compounds and condensed and simple 5-ring compounds. Cantharidine (1) is a contact insecticide that occurs in nature and a specific attractant for some insect species. As the production of highly halogenated canthari-

dine, which was first thought of, raised certain difficulties and moreover since compounds of the halogenhydrocarbon class were supposed to be included in the considerations in the first rank, we selected substances that were free of oxygen, which were "closely related structurally to cantharidine", i.e., mono-, bi-, tri-, and penta-cyclic C_5hydrocarbons—Cyclopentene (II), Cyclopentadiene (III), Methylfulvene (IV), Endomethylene-cyclohexene (V), Endomethylene-hydrindane (VI), Endomethylene-tetrahydrohydrindene (VII), Dicyclopentadiene (VIII), Tricyclopentadiene (IX), and others. After investigation of Octachlorocyclopentene, Hexachloro-cyclopentadiene, Octachloromethylfulvene and others (6) we arrived at the Halogenhydrocarbons hitherto briefly designated as M 410- and M 344-effective materials. The M 410-effective material is an octachloro-derivative from VII, M 344 a corresponding fluoro-chloro-derivative. The M 410-effective material, particularly, according to laboratory and field experiments up to now, ought to be concerned in the practical control of pests and diseases, seeing that pharmacological tests on mice have shown that it is not more toxic than DDT compounds, for example. Its effective range seems to be great (6). With regard to insecticidal effectiveness, the M 410-effective material, an octachloro-derivative of Entomethylene-tetrahydrohydrindene (X)[2], is able to compete with the HCH-effective material, the hexachloro-derivative of Cyclohexane (XI), and the DDT-effective material, the pentachloro-derivative of Diphenylethane (XII). In the same way the effective materials M 344[3], 666F, and DFDT (FC) are of value in the fluoro-chloro-derivatives of these three basic types. In any case a greater number of isomers is theoretically possible. The individual isomers which have been represented differ significantly in part in their effectiveness. Only one or a few of them are marked by special activity.[4] The interesting parallel between physiologically effective "constitutionally similar" oxygen- and halogen-containing compounds which have been sharply defined in the inositols and hexachloro-cyclohexanes, for example, is continued here: Cantharidine—the effective material of M 410. While a reasonable formula similarity is evident in the latter case, a probable even steric relationship is present in Gammahexane and Mesoinositol.



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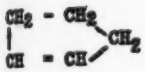

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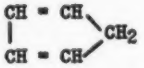

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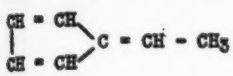

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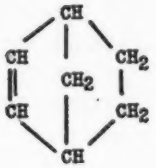

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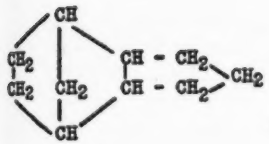

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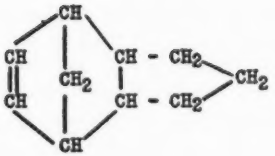

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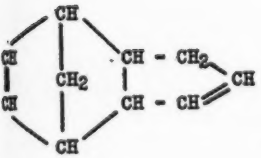

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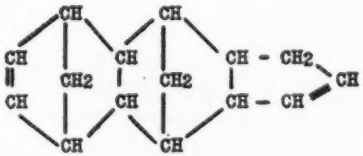

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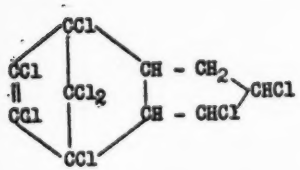

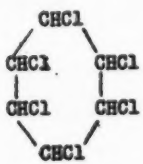

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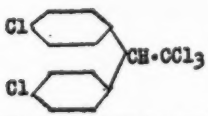

XII

LITERATURE:

(1) Süddtsch. Apotheker-Ztg. 86, 181 (1946); Dtsch. Ges. Wes. 2, 58 (1947).

(2) Z. Naturforsch. 2b, 244 (1947); Angew. Chem. 59A, 250 (1947); Drog. Fachbl. 18, 19 (1947).

(3) 2nd Beiheft of the 1st Erg.-Bande zur "Pharmazie" 1947, page 121; Der chem.-techn. Fabrikant 43, 73 (1947).

(4) Angew. Chem. 59A, 250 (1947); Beiheft zur "Pharmazie" 1948 (in the press); Angew. Chem. 59A, (1947) (in the press).

(5) 2nd Beiheft of the 1st Erg.-Bande zur "Pharmazie" 1947, Tab. 4, 5, and 9, pages 133 to 140 and 162 to 164; Beiheft zur "Pharmazie" 1948 (in the press).

(6) Beiheft zur "Pharmazie" 1948 (in the press).

(7) 2nd Beiheft of the 1st Erg.-Bande zur "Pharmazie" 1947, page 138 or 92.

(8) Chem. and Ind. 40, 314-319 (1945).

(9) In 1946 K. C. Kauer reported on the epsilon isomer of the HCH-effective material, in Chicago.

REMARKS:

2. 1, 2, 4, 5, 6, 7, 10, 10-octachloro-4, 7-endomethylene-4, 7, 8, 9-tetrahydrohydrindene after synthesis, catabolism (chlorohydrogen-cleavage, oxydation), molecular weight, elementary analysis, etc.

3. In a communication dated Oct. 8, 1946 (2) I pointed out M 344 as the fluoro-derivative of the M 410-effective material.

4. The following have been prepared up to now:

From the DDT effective material:

p, p′-isomer, melting point 107.5-108.2°C (6,7)
m, p′-isomer, boiling point 2 mm 187-190°C (6,7)
o, p′-isomer, melting point 73-74°C (6,7)
o, o′-isomer, melting point 88-91°C (6,7)

From the DFDT effective material:

p, pp′-isomer, melting point 43.5-44.5°C (2,6)
m, p′-isomer, boiling point 0.1 mm 112-116°C (2,6)
o, p′-isomer, boiling point 4 mm 125-127°C (2,6)

From the HCH effective material:

alpha-isomer, melting point 158°C (7,8)
beta-isomer, melting point [!309]°C (7,8)
gamma-isomer, melting point 112.5°C (7,8)
delta-isomer, melting point 138-139°C (7,8)
epsilon-isomer, melting point 218.5°C (9)

From the M410 effective material:

Isomer or isomeric mixture, boiling point 1 mm 165-167°C
Isomer or isomeric mixture, boiling point 1 mm 172-175°C

The following are marked by special activity: p, p′- and m, p′-DDT and DFDT effective material, gamma-HCH-effective material, and the two "isomers" of the M 410-effective material mentioned. With reference to the length of effect, the effective material of M 410 is superior to that of HCH, DDT, and DFDT, while in general the reverse sequence applies to the speed of effect. M 410 has contact- and food-poison effect.

Tr.: R. Ericson
11/13/51

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FILED
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CHARLES ELMORE CROPLEY

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Answer to Petition for Rehearing.

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ANSWER TO PETITION FOR REHEARING.

To the Honorable Chief Justice of the United States and Justices of the Supreme Court of the United States:

Velsicol Corporation, plaintiff below and respondent here, for answer to the petition for rehearing, filed on the last day permitted by the Rule, says:

Defendants, JULIUS HYMAN & COMPANY, JULIUS HYMAN, and others, in the guise of a petition for rehearing, present a second petition for writ of certiorari. This piecemeal presentation is in violation of the rules of this Court and of established practice and should not be countenanced.

Neither of the alleged new grounds bring this case within the class this Court has jurisdiction to review.

We refer to our answer to the petition for writ of certiorari (pp. 16-25) for support of our renewed position that the jurisdictional requisites are lacking.

Defendants do not refer to record evidence that the new questions they belatedly seek to raise were presented below. The fact is the questions were not presented to the District Court. There was no request in that court to modify the terms of the injunction. Nevertheless, the Supreme Court of Colorado considered the contention that the injunction was indefinite and inequitable and held that the contention was without merit, (R. VI, 63-65,) citing *Regal Knitwear Company* v. *Board,* 324 U. S. 9. The Colorado Court pointed out that any defendant, who later finds himself unduly restricted by the injunction, has his remedy in the District Court upon proper application. Obviously, no decree awarding an injunction can anticipate changed conditions which would make a new case and afford grounds for modification of the injunction.

In the cited case, this Court said: (324 U. S. 15)

> "If defendants enter upon transactions which raise doubts as to the applicability of the injunction, they may petition the court granting it for a modification or construction of the order."

In an earlier case, *Warner & Co.* v. *Lilly & Co.,* 265 U. S. 526, this Court pointed out that an injunction should be confined to restraining wrongful acts, and then added: (p. 532)

> "But respondent, being entitled to relief, is entitled to effective relief; and any doubt in respect of the extent thereof must be resolved in its favor as the innocent producer and against the petitioner, which has shown by its own conduct that it is not to be trusted."

The decision of the Supreme Court of Illinois, (*Velsicol Corporation* v. *Julius Hyman,* 405 Ill. 352,) which this Court refused to review, (339 U. S. 966,) is *res adjudicata* as to the validity and enforceability of the employment agreements here involved. It was there squarely decided that Hyman was bound by the agreement that he signed and that it was valid and equitable. The agreements signed by the other individual defendants contained the same restrictions as the Hyman agreement. Our answer to the petition for writ of certiorari (pp. 38-41) is our answer to this new attack. The point has no more merit now than it had when it was presented in the first petition.

Our statement of the facts, supported by record references, (Answer, pp. 9-15,) is a complete answer to the speculations of defendants as to what might have been. These defendants breached their trust, and their pretense of injured innocence has fooled no court, Illinois or Colorado, which has heard the evidence.

We think it a little late for defendants to bring forward some publication, allegedly made in March, 1948, as the basis for modification of the decree for injunction which was entered by the District Court May 28, 1948. Defendants say the article, attached as an appendix to the petition for rehearing, was in their possession during 1948. This case was then pending in the District Court and that court continued to exercise jurisdiction in this case for two more years. The matters of accounting were tried in 1949, and the final decree was entered in the District Court May 11, 1950. (Answer, p. 8.) If defendants thought this publication, now belatedly presented, furnished any ground of defense, why did they neglect to present it to the District Court?

The document shows merely that someone in Germany in 1948 was writing about products which had been discovered in plaintiff's laboratories by plaintiff's employees in 1944 and 1945, and which had long since been covered by applications for letters patent. No case would ever be concluded if the course suggested by defendants were allowed.

This case was correctly decided below. (Answer, pp. 25-41.) In any event, no question is presented which this Court will review. (Answer, pp. 16-25.) The decision of the Supreme Court of Colorado rests on non-federal grounds. The opinion of the Supreme Court of Colorado shows clearly that no federal question was presented for decision. It is settled law that this Court will not review a judgment of a State court, except where the record shows affirmatively that a federal question was raised by the pleadings or on the trial and was presented to the State court for decision and was actually decided, or that the judgment as rendered could not have been given without deciding it. Defendants have failed to show that this case comes within this rule.

Respectfully submitted,

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